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No. .....

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In The

Supreme Court of the United States

October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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State of Rhode Island

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QUESTION PRESENTED

Does the self-incrimination clause of the Fifth Amendment require the suppression of three confessions, each made after proper *Miranda* warnings and three valid waivers of rights, solely because an attorney unrequested by defendant, was given misleading information by a police officer that there would be no further interrogation of the defendant that night and the defendant was not informed of the attorney's call?

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Now comes the Petitioner, by his attorney, and prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals For The First Circuit to review said court's erroneous decision of a federal constitutional question.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals For The First Circuit which granted the Respondent's petition for a writ of habeas corpus is reprinted in Appendix A. The case is entitled *Burbine v. Moran,* No. 84-1554 (1st Cir. January 25, 1985). It is unpublished at present. The opinion of the United States District Court for the District of Rhode Island which denied Respondent's petition for a writ of habeas corpus is reprinted in Appendix B. That opinion has been reported sub nom. *Burbine v. Moran,* 589 F. Supp. 1245 (D.R.I. 1984). The opinion of the Rhode Island Supreme Court initially denying Respondent's direct appeal of his conviction in state court is reprinted in Appendix C. That opinion has been reported sub nom. *State v. Burbine,* 430 A.2d 438 (R.I. 1981). The opinion of the Rhode Island Supreme Court's denial of Respondent's direct appeal after reargument is reprinted in Appendix D. That opinion has been published sub nom. *State v. Burbine,* 451 A.2d 22 (R.I. 1982).

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the First Circuit granting the petition for a writ of habeas

corpus was entered on January 25, 1985. A copy of that order is annexed as Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1) and by the Rules of the Supreme Court of the United States R. 17.1 (a) (c).

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CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

———o———

STATEMENT OF THE CASE

The Petitioner seeks certiorari from the Court of Appeals for the First Circuit which reversed the decision of the United States District Court for the District of Rhode Island denying Respondent's petition for a writ of habeas corpus.

The criminal charges against Brian Burbine (the Respondent herein), were the result of the death of a woman

named Mary Jo Hickey. Mary Jo Hickey was found unconscious in a parking lot in Providence, Rhode Island on the morning of March 3, 1977. Suffering from injuries to her skull and brain resulting from bludgeon wounds inflicted by a large metal pipe found near the scene of the attack, she was hospitalized. Approximately three weeks later, on March 25, 1977, she died.

On March 4, 1984, Brian Burbine left Rhode Island to visit Nancy Jean Sanders James and her brother, Donald Sparks, at their home in Maine. During his stay Burbine told Nancy James that he had met Mary Hickey in a bar in Providence on the evening of March 2, 1984. Mary had bought him some drinks and then asked for a ride to her home. Burbine further stated that on the way to her house, he pulled into a parking lot and made advances to Mary. When the advances were resisted, Burbine slapped her "a time or two" and threw her out of the car. This had all happened just before he came to Maine. Burbine told substantially the same story to Donald Sparks but added that there was some blood on Mary, as a result of his striking her and that he had washed blood from the interior of his automobile the next morning.

A few months later, at about 3:30 p.m. June 29, 1977, police in Cranston, Rhode Island, arrested and charged three men in connection with a breaking and entering. Burbine was one of them and Donald Sparks was another. The third was a man named DiOrio. For purposes of interrogation, they were placed in separate rooms in the detectives' division in the basement of the Cranston police headquarters. It was learned that DiOrio and Burbine lived at 306 New York Avenue. When Detective Ferranti of the Cranston Police was informed of this fact,

he recalled that he had been told two days earlier by a confidential informant that a man named "Butch" living at 306 New York Avenue was responsible for the death of Mary Jo Hickey. Between 5:00 and 6:00 p.m. Ferranti learned from DiOrio that Burbine was the only "Butch" living at that address. Detective Ferranti then went to the room where Burbine was being held. Ferranti informed Burbine of his *Miranda* rights, but at this point Burbine refused to sign a waiver-of-rights form and refused to say anything further. However, he did respond that he was the only person called "Butch" who resided at 306 New York Avenue.

At about 6:00 p.m., after obtaining from DiOrio and Sparks statements implicating Burbine in the killing of Mary Jo Hickey, Ferranti, cognizant that Mary Jo's murder had occurred in Providence not Cranston, called the Providence police to convey what he had discovered. At approximately 7:00 p.m., three officers of the Providence police, Detectives Bernard, Gannon and Edward Trafford and their supervisor, Captain Wilson, arrived at the Cranston Police headquarters and went to the detective division for the purpose of questioning Burbine about the killing of Mary. They spoke first with Detective Ferranti and then questioned Sparks and DiOrio.

At approximately 7:45 p.m., Burbine's sister called the Office of the Public Defender (without her brother's knowledge), to seek legal assistance for him. Her sole concern was the break-in as at that time she had no knowledge that he was a suspect in Mary Jo's death. She asked for Assistant Public Defender Richard Casparian, who had previously represented her brother in another crim-

inal matter not related to the instant reason for his police custody. In fact, Burbine had missed an appointment with Casparian the afternoon of his arrest. As soon as Burbine's sister hung up, the person who took her call tried to reach Casparian. Once it was determined that he was unavailable, Allegra Munson, another Assistant Public Defender, was contacted and informed of the situation.

At approximately 8:15 p.m. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives". Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. Munson did not ask to speak with Burbine, nor did she inquire as to why he was in custody. She did not mention the homicide investigation which she was unaware of at that time. The unidentified person told Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. He indicated that Burbine would be brought to court the following morning for arraignment on the breaking and entering charge. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder.

Who at the headquarters was speaking to Ms. Munson has never been determined. Ms. Munson had neglected to ask his identity. All of the officers questioned concerning the incident denied receiving or knowing about the

call. It should be noted that there is no evidence to indicate that the Providence police (or Ferranti for that matter) were made aware of Munson's call until long after Burbine had given his statements. Burbine was never told of Munson's call, her offer of assistance, or the information that was given her.

At approximately 9:00 p.m., Burbine was brought to the main room in the detective division where Ferranti and his immediate superior, Lieutenant Ricard, and the three Providence officers had gathered. After being advised of his rights, he was asked about the Hickey killing and, appearing "fidgety", denied involvement. He was then returned to the smaller room. About ten minutes later, Ferranti heard repeated banging on the door of that room and went to speak with Burbine. He was crying and said he was "disgusted"; "sorry" and wanted to make a statement. Ferranti went to get two of the Providence officers, Detective Gannon and Trafford, and the three of them brought Burbine to the main office to take a statement. The detectives then read Burbine his *Miranda* rights, ascertained that he understood what his rights were, and at about 9:30 p.m. obtained his signature on a waiver-of-rights form. App. G. He was later described as having been "shaky at times", but as having spoken clearly. For the next fifty minutes, Detective Gannon conducted the interrogation, typing his questions and Burbine's answers. At 10:20 p.m., Burbine signed a typed, four-page, inculpatory statement and Detective Ferranti "notarized" it App. H.

Burbine was then returned to the smaller room, where there was a phone available to him and given food. Sometime between approximately 10:45 p.m. and 11:00 p.m.,

he said he had omitted some information and was returned to the main room. He was again read his *Miranda* rights, signed the waiver form, App. I, and gave a second statement. App. J. This one was signed at 11:20 p.m.

Finally, at approximately noon the following day, June 30, 1977, following his presentation to the District Court on the breaking and entering charge, Burbine was taken to the Providence Police headquarters, where he again was given his *Miranda* rights and signed a waiver form. App. K. Burbine then gave a third inculpatory statement, this time to Detective Trafford. App. L. At 12:05 p.m., while this final statement was being taken, Trafford's supervisor, Major John Leyden, called the office of the Public Defender to obtain the presence of an attorney, Burbine still declining to request one, for an identification lineup that was to follow. Later that day, Assistant Public Defender Casparian came to the Providence headquarters and assisted Burbine during the lineup.

At the subsequent hearing on Burbine's motion to suppress his three written statements, the Superior Court found that Ms. Munson did make the phone call, as described above, but also "that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney . . .'" *State v. Burbine*, 451 A.2d at 24. It also found that Burbine was not threatened, coerced, or promised any benefits in exchange for his three statements and that Burbine had "knowingly, intelligently and voluntarily waived" his right to counsel and his privilege against self-incrimination. *Id.* at 24.

In accordance with these findings, the court denied Burbine's motion to suppress. App. 117. Burbine was

subsequently convicted of first degree murder on the basis of his three statements and the testimony of Nancy Jones, Donald Sparks, and other witnesses.

Burbine appealed the denial of his suppression motion to the Supreme Court of Rhode Island, which affirmed the lower courts decision. Burbine then petitioned the United States District Court of Rhode Island for a writ of habeas corpus, alleging Fifth, Sixth, and Fourteenth Amendment violations. The District Court reviewed the record of the State proceedings and denied the habeas corpus petition in an order and opinion dated June 7, 1984 by United States District Judge Bruce Selya. App. B.

Burbine filed a notice of appeal from the District Court's order denying his petition on June 21, 1974, and a certificate of probable cause was granted by the District Court.

Burbine alleged in his appeal before the United States Court of Appeals for the First Circuit that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the failure of police to communicate to his attorney their plans to interrogate him and their failure to tell him that an attorney acting for him at the request of his sister had called to offer her services. That court did not reach Burbine's Sixth and Fourteenth Amendment claims but reversed the district court's denial of the petition for the writ of habeas corpus on the ground that the failure of the police to communicate to Burbine that an attorney had called offering assistance and the misleading advice given to the attorney, violated Burbine's Fifth Amendment right to counsel and his privilege against self-incrim-

ination and held that all three of the inculpatory statements that he made while in custody should have been suppressed.

Burbine at the time of the writing of this petition is serving his sentence at the Rhode Island Adult Correctional Institution in Cranston, Rhode Island. It is anticipated that he will be eligible for parole in July 1987.

The sole issue in this case is whether or not the court of appeals erred in ruling that Burbine was denied his right to counsel and privilege against self-incrimination, guaranteed by the Fifth Amendment to the United States Constitution.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The Rhode Island Supreme Court upheld Burbine's conviction and affirmed the trial justice's denial of Burbine's claim that his constitutional right to counsel and privilege against self-incrimination were violated. *State v. Burbine,* 451 A.2d at 31. Burbine then filed a petition for writ of habeas corpus in the United States District Court for the District of Rhode Island which was denied. In denying Burbine's petition, the district judge expressly rejected his argument that his constitutional right to counsel and privilege against self-incrimination had been violated by the failure of police to inform him that an attorney had called the station inquiring about him or the imparting by the police of misleading information to the attorney. *Burbine v. Moran,* 589 F.Supp. at 1252. Bur-

bine renewed his assertion that he had been denied his right to counsel and privilege against self-incrimination on appeal to the First Circuit Court of Appeals. That Court in addressing the Fifth Amendment constitutional claim of Burbine held that the failure of the police to communicate the attorney's call to Burbine and the misleading information provided the attorney did violate Burbine's Fifth Amendment rights and reversed the judgment of the district court and ordered a writ of habeas corpus to be issued. *Burbine v. Moran,* App. A.

REASONS FOR GRANTING THE WRIT

Introduction

A writ of certiorari should be granted to resolve the question of whether the appearance of an attorney, unrequested by defendant, who is unsuccessful in communicating with the defendant in custody, because of misleading information provided by a police officer, should cause an otherwise constitutionally valid waiver of *Miranda* rights by the defendant to be vitiated.

The decision of the United States Court of Appeals is in direct conflict with the decision of the Rhode Island Supreme Court in *State v. Burbine,* 451 A.2d 22 (1982) the court of last resort of the state from which this case originated. It is also in direct conflict with the decision of the Eleventh Circuit Court in *Hance v. Zant,* 696 F.2d 940 (11th Cir. 1983) as to the effects of the unsuccessful attempt by an unrequested attorney to communicate with a defendant, held in custody by police, on the defendant's

waiver of his Fifth Amendment rights to retain or appointed counsel and his privilege against self-incrimination.

This not infrequent occurrance of events presents this Court with an important and substantial federal question which has not been, but should be, settled by this Court.

Finally the First Circuit decision is contrary to the principle established by the Supreme Court in *U.S. v. Nobles,* 422 U.S. 225 (1975) and *Couch v. United States,* 409 U.S. 322 (1973) that the Fifth Amendment privilege is an intimate and personal privilege which adheres to the person and protects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.

The Decision Of The United States Court of Appeals For The First Circuit Should Be Reviewed Because It Conflicts With The Decision On The Same Federal Question By The Rhode Island Supreme Court.

Review by this Court, via certiorari, is appropriate in the present case because the Court of Appeals For The First Circuit has decided a federal question in a way that directly conflicts with the Rhode Island Supreme Court, a state court of last resort. *See e.g.* U.S. Sup. Ct. R. 17.1(a); *Anderson v. Maryland,* 427 U.S. 463, 470 F.note 5 (1976).

The direct conflict between the Court of Appeals and the Rhode Island Supreme Court stems from the major premise of the Court of Appeals holding in *Burbine v. Moran* App. A that Burbine's Fifth Amendment right to counsel and his privilege against self-incrimination were

violated because an attorney, unrequested by Burbine, was given misleading information when she called the police station where Burbine was held in custody, and because Burbine was not informed of her call. The First Circuit Court having found, contrary to the Rhode Island Supreme Court, that the police deliberately or recklessly misled the attorney, stated that such action towards "an attorney, who has a legitimate professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, is more than just one factor in the calculus of waiver. This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary." *Burbine v. Moran,* App. A. The Court of Appeals did agree with the Rhode Island Supreme Court to the extent that it found *Miranda* warnings were duly given to Burbine, damaging admissions were made, and there was no hint of threats or physical coercion by the police. But based solely on the additional factor, that the police failed to inform the suspect in custody that an attorney had called seeking to advise him if necessary, his waiver of his Fifth Amendment right to assistance of counsel at his questioning was vitiated.

This decision is contrary to the reasoning and ruling of the Rhode Island Supreme Court. The opinion of the Rhode Island Supreme Court stresses the historical attempt of this Court to find a means of striking a balance between societal need for police interrogation and the protection of the accused from undue coercive pressures. This search having culminated in this Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966) which imposed

a set of rules upon every police officer who might seek to interrogate a person suspected of crime who had been taken into custody or whose freedom had been inhibited in a significant way. These now well known *Miranda* rights were required to be given to the suspect: (1) the right to remain silent; (2) that anything which he might say can be used against him in a court of law; (3) the right to presence of an attorney; (4) if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. This Court went on to say:

> "After such warnings have been given and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Id. at 479.

By this decision the extension of the privilege against self-incrimination from the courtroom into the police station was made complete. Cases following *Miranda* have extended and clarified the *Miranda* rule and their relationship to the right of counsel. Once the dual elements of custody plus interrogation are present, the necessity for *Miranda* warnings exists and the burden of providing these warnings was placed squarely upon the police. The Supreme Court required all law enforcement officials to respect without equivocation a suspect's request for counsel or assertion of the right to remain silent. If the suspect waives his *Miranda* rights and the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelli-

gently waived his privilege against self-incrimination and his right to retain an appointed counsel. Id. at 475.

The determination whether an accused has knowingly and voluntarily waived his *Miranda* rights depends on all the facts of each particular case. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1970). These circumstances include the background, experience, and conduct of the accused. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). And although an express, written waiver may be persuasive evidence, the trial justice must nevertheless examine the circumstances and facts in their totality to determine whether waiver has in fact occurred. *North Carolina v. Butler,* 441 U.S. 369, 375-76 (1979). In Rhode Island when the voluntariness of an extrajudicial statement or confession is challenged, the trial judge must conduct an evidentiary hearing outside the presence of the jury in order to determine admissibility under constitutional standards, the statement or confession may be admitted only if the trial judge is persuaded by clear and convincing evidence that it was not illegally obtained. *State v. Benton,* 413 A.2d 104, 109 (R.I. 1980). If the statement is admitted into evidence, under Rhode Island law the question of voluntariness is again submitted to the jury. Thus the practice in Rhode Island provides a criminal defendant with the constitutionally required "reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Lego v. Twomey,* 404 U.S. 477, 489 (1972). On appeal, if the Rhode Island Supreme Court is satisfied that the trial justice adequately and correctly applied the procedures, it examines the record in the light most favorable to the prevailing party and reverses only if it finds that

the decision of the trial justice was clearly erroneous. *State v. Killay,* 430 A.2d 418, 421 (R.I. 1981).

The Rhode Island Supreme Court held in the *Burbine* case that the finding of the trial justice that the confessions were voluntary and made following intelligent waiver of counsel and the right to remain silent was supported by ample evidence and was clearly not wrong.

The Rhode Island Court stated that nothing in the *Miranda* opinion or in succeeding cases has indicated that the right to counsel may be asserted by anyone other than the accused. The strength of *Miranda,* according to Justice Weisberger, who wrote the majority opinion for the court, lies in its simplicity. It was designed as a set of sharp, bright-line directions which police officers could easily follow. "Consequently, we are of the opinion that the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys." *State v. Burbine,* App. 60.

The Rhode Island Court is directly in conflict with the First Circuit's holding that there was an obligation on the part of the police to inform Burbine of the telephone call in order that his written and verbal waivers of his right to remain silent and the right to counsel might be knowing and intelligent. The Rhode Island Court found the evidence overwhelming in support of the trial justice's finding that Burbine was admonished prior to the signing of each waiver of the right to remain silent and of his right to retain an appointed counsel. As the court said:

> "It hardly seems conceivable that the additional information that an attorney whom he did not know

had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver. Indeed, the additional information seems somewhat inconsequential in light of defendant's own knowledge as supplemented by the admonitions of the police officers." *State v. Burbine,* 451 A.2d 22, 29 (1982).

Thus, petitioner respectfully submits that the conflict is explicit and direct. The court should grant a writ of certiorari to resolve this conflict.

The Decision Of The United States Court Of Appeals For The First Circuit Should Be Reviewed Because It Conflicts With A Prior Decision By The United States Court Of Appeals For The Eleventh Circuit.

The decision of the United States Court of Appeals For The First Circuit is in conflict with the decision of another federal court of appeals on the same matter. The First Circuit's opinion in *Burbine* held that although a person in custody may speak to the police if he so chooses, and without a lawyer's advice, the crucial point is that it must be a knowing choice as well as voluntary in the sense of not being coerced. In addition the holding was restricted to the advice of a lawyer having some definable continuing relationship to the client. The facts in *Burbine* were found to support this holding, but the additional factor which caused the First Circuit to issue a writ of habeas corpus was the failure by the police to tell Burbine that an attorney had called inquiring about him and the fact that the police told the attorney that Burbine would not be questioned or put in a lineup that evening when in fact he was questioned further. The First Circuit based

only on these facts as testified to by the attorney, with no corroboratory evidence and no acknowledgment as to the phone call by any of the testifying police, characterized the behavior of the police as "reckless" and therefore amounting to a violation of Burbine's Fifth Amendment right to counsel and privilege against self-incrimination.

The United States Court of Appeals For The Eleventh Circuit in *Hance v. Zant,* 696 F.2d 940 (11th Cir. 1983)[1] cert. denied 103 S.Ct. 3544 took a different position. In *Hance,* the court was in initial agreement with the First Circuit. The court said that pursuant to *Johnson v. Zerbst,* 304 U.S. 458 (1938), the State must prove "an intentional relinquishment or abandonment of a known right or privilege" and in this case the trial court found by a preponderance of the evidence that Hance was properly advised of his rights, and that he voluntarily signed a written waiver of those rights including his right to counsel. Hance argued that the confessions resulting from his interrogation should be excluded because law enforcement officials prevented his attorney from advising him thereby violating his Fifth, Sixth and Fourteenth Amendment Rights. The Eleventh Circuit Court found that Hance never requested an attorney and that the attorney was never refused access to him.

Hance was interviewed by two agents at Central Intelligence Division Headquarters at Fort Benning, Georgia where he was a soldier and a suspect in the murders of two prostitutes. He was advised of his rights and informed that the interview concerned the murder of a

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[1] The defendant's death sentence was set aside by the court on other grounds.

woman with whom he was the last person seen. Hance signed a waiver of rights and an interview was conducted from about 1:00 p.m. until 10:20 p.m. He was interviewed by F.B.I. and Columbus police for another hour during which he made inculpatory admissions. The next morning at about eight, Hance was again advised of his rights, which he again waived. He was interviewed until about 3:15 p.m. when he signed a written statement concerning the murder. At no time did Hance request a lawyer or ask that the interview be terminated.

The attorney in this case was a local attorney who had represented Hance in civil matters and who had heard of his arrest and called the county jail, Columbus Police Headquarters and Central Intelligence Division Headquarters at Fort Benning before locating his whereabouts. He had not been contacted by Hance but had called simply because he wanted to advise Hance of his rights. The agents questioning Hance testified that they did not know that an attorney was attempting to find Hance, but when they learned this fact they told him. By then he had already confessed and he refused to see the attorney. *Hance v. State,* 268 S.E.2d 339 (S.Ct. Ga. 1980). Under these circumstances the Eleventh Circuit found that Hance's statement was freely and voluntarily given and the trial court was held not to have erred in failing to exclude it.

These facts are similar to those in the *Burbine* case. An attorney claims to have attempted to contact a person in custody, to have spoken to the police, yet the defendant was not told of the call. Should it matter that the defendant is in another building as opposed to another room? Couldn't the Columbus Police who were questioning him at C.I.D. headquarters immediately have for-

warded a call from the station to inform Hance an attorney was attempting to speak to him? The opinion in *Hance* does not reveal what information was provided the attorney by the police as he called the different police stations, but it is apparent that by the time he reached Hance, it was too late. In this case the fact that none of the police immediately assumed responsibility to see that Hance was informed of the attorney's call was not held to be reckless or negligent action so as to violate his Fifth Amendment rights.

It is clear that the court in *Hance* did not consider the fact that an attorney was diligently attempting to reach the client in custody and was unsuccessful, a bar to the defendant's ability to voluntarily and knowingly waive his Fifth Amendment right to counsel, whereas the First Circuit Court in *Burbine* concluded that the inability of the attorney to effectuate her presence at Burbine's questioning was sufficient to vitiate his otherwise knowing waiver of his Fifth Amendment rights. Thus petitioner respectfully requests that this court resolve the conflict between the circuits by granting his petition for writ of certiorari.

The Question Is Substantial

The First Circuit in its opinion in the *Burbine* case suppressed three confessions where *Miranda* warnings were properly given and otherwise valid waivers of rights were signed because an unrequested attorney telephoned the police station and was given the misleading information that Burbine would not be interrogated further that night. Burbine was not told of the attorney's call. The First Circuit determined that this occurrence vitiated any

claim that a waiver of counsel was knowing and voluntary. The court stated "the question is not how badly counsel was misled, but the effect of any misrepresentations on the knowingness and voluntariness of petitioner's waiver of his privilege against self-incrimination and his right to counsel thereon." App. 11. The court continued, "In determining whether his waiver was valid, we are to 'assess the particular facts and circumstances surrounding [the] case including the background, experience, and conduct of the accused.'" *North Carolina v. Butler,* 441 U.S. 369, 374-75 (1979). After applying the above standard to Burbine's case, considering Burbine's education, his past exposure to the criminal justice system, his demeanor, and the lack of direct physical or psychological pressure from the police, the First Circuit could accept a valid waiver by Burbine of his rights. The factor which tipped the scale in the case was the misleading information given to his attorney and the fact that Burbine was not told of her call. The Circuit Court then speculated as to what effect this information might have had on Burbine. App. 14. The Circuit Court concluded that if the police had told Burbine that an attorney had called and been told that he was not to be questioned that evening he, instead of denying all involvement and then doing a sudden about-face and volunteering to confess, might very well have decided to hold his interrogators to their word as it had been expressed to attorney Munson. The Circuit Court infers that a conversation with his attorney might have caused Burbine to have a change of mind. But the privilege against self-incrimination has been consistently held to be a personal privilege and must be asserted by the person entitled thereto, and not by others on his behalf. *United*

States v. Nobles, 422 U.S. 225 (1975); *Couch v. United States,* 409 U.S. 322 (1973). We have here the very set of circumstances that Mr. Justice White foresaw in his dissenting opinion in *Miranda.*

> "All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That Amendment deals with compelling the accused himself. It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are barred. . . . The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege." Id. 384 U.S. 536-537.

In this case Burbine's confessions were corroborated by other evidence. He was almost anxious to tell his story and even after presentment in court the next day on another charge, he continued to state that he did not want an attorney.

Since the First Circuit found in this case "either deliberate or reckless irresponsibility on the part of the person who responded to attorney Munson's call", which prevented her from communicating with Burbine, it held that such behavior clearly vitiated any claim that Burbine's waiver of counsel was knowing and voluntary. But this Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. It has not held that the sine qua non for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and quality of the evi-

dence in the case. *Oregon v. Elstad,* No. 83-773 (U.S. March 4, 1985).

The First Circuit in *Fuentes v. Moran,* 733 F.2d 176 (1984), stating that "trickery" by police can vitiate a Fifth Amendment waiver, under circumstances similar to the *Burbine* case found that failure by police to tell Fuentes' attorney that Fuentes was a suspect and not merely wanted for questioning and failure to inform Fuentes of his attorney's call inquiring as to his status did not constitute "trickery to render his waiver of his Fifth Amendment Rights involuntary." In *Fuentes* the First Circuit agreed with the Rhode Island Supreme Court's holding in *State v. Fuentes,* 433 A.2d 184 (R.I. 1981) which affirmed the trial justice's denial of Fuentes' pre-trial motion to suppress his confession under the Fifth, Sixth and Fourteenth Amendments.

In comparing the *Burbine* and *Fuentes* cases it would appear that the First Circuit is assuming a supervisory role over the Rhode Island Supreme Court and taking upon itself to determine when and if police action was proper in dealing with attorney requests concerning defendants in custody for interrogation. In *Fuentes* the First Circuit stated ". . . some of the questions or contrary inferences we have noted indicate how careful law enforcement officials must be in dealing with suspects and lawyers during the investigatory phase of a prosecution." Id. 181. This statement clearly reveals the First Circuit's interest in reviewing police behavior. On appeal from a United States District Court's denial of a state prisoner's application for habeas corpus the review by the Court of Appeals is the narrow one . . . and not the broad exercise of supervisory power that the court could possess in re-

gard to its own trial court. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974). A writ of habeas corpus has limited scope: the federal courts do not sit to retry state cases de novo but rather to review for violation of federal constitutional standards. *Milton v. Wainwright,* 407 U.S. 371 (1972).

The Miranda standards were met in this case. Whether an unrequested attorney appears, or how soon he appears at the police station, or how quickly he dials the telephone, hardly seems a rational way of reconciling the interests of the accused with those of society. See Y. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?* in Police Interrogation and Confessions 220 (1980). For these reasons the Court should grant a writ of certiorari to review the Circuit Court's decision.

The Decision Of The United States Court Of Appeals For The First Circuit Is Erroneous Because It Is Predicated On Factual Findings And Assertions Which Are Not In The Record And Are Plainly Wrong.

It is appropriate for this Court to grant certiorari in a case where there is both "an important question" and a "doubtful determination" by the court below. See e.g., *Williams v. Lee,* 358 U.S. 217, 218 (1959). Here, there is an important question as to whether a finding can be made of a valid waiver of Burbine's constitutional right to counsel and his privilege against self-incrimination in face of the inability of an unrequested attorney to reach him because of misleading information provided by the police. There is also a doubtful determination by the First Cir-

cuit Court of Appeals that the police acted recklessly in this case. The Court of Appeals' determination was doubtful because it is an unsupportable conclusion of law predicated on factual findings which were not found in the record and were therefore plainly wrong.

It is axiomatic that in habeas corpus proceedings, state court findings of fact are entitled to a presumption of correctness by the federal courts. *Sumner v. Mata,* 455 U.S. 591, 597 (1982). However, the presumption disappears if it can be established that the factual findings are not supported in the record. Id. 592.

The First Circuit based its entire decision to grant Burbine's petition for a writ of habeas corpus on a finding that the failure to communicate by the police was to be characterized at the minimum as reckless and therefore vitiated Burbine's otherwise valid waiver of his Fifth Amendment rights. The evidence before the trial justice shows that two Cranston police officers and three Providence police officers testified they did not receive the attorney's call. But there was additional testimony that there were other police officers present at the station at the time in question. Therefore, the trial court, ruling on Burbine's motion to suppress, could have drawn a reasonable inference that it was one of the unnamed officers who answered attorney Munson's call. The trial justice stated that the court was satisfied that the call was made and that someone responded, whoever that person might have been. App. 114. This ruling was supported by the record and is therefore entitled to a presumption of correctness. *Sumner v. Mata,* 455 U.S. at 592. The trial justice was also satisfied that there was no conspiracy or collusion on the part of the Cranston Police Department

to secrete Burbine from his attorney whoever that might have been. App. 114. It seems an obvious deduction from these findings that the trial justice found no irregularities concerning the conduct of any of the Cranston Police officers involved. In fact there was never any evidence that any of the officers who participated in the investigation knew of Munson's call, nor did the trial justice impute any such knowledge to them. The First Circuit determined that the action of some unidentified police officer was reckless with no evidence in the record to support that conclusion. The finding of the First Circuit was based purely on speculation and conjecture and therefore clearly wrong in the face of the lack of evidence to support its conclusion.

In this case the First Circuit has rejected the proposed solutions to the apparent incongruities of the findings that a telephone call was made, but no particular person was identified to have received it, offered by the Rhode Island Supreme Court and accepted by the federal district court and substituted its own hypothesis. Its hypothesis has certainly even less support in the record and is therefore clearly wrong and should be corrected by this Court.

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CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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